Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1512

LARRY FRIERSON, *et al.*, PETITIONERS,

versus

JOHN C. WEST, GOVERNOR OF SOUTH CAROLINA, *et al.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and is set out in the Appendix to the Petition at 1a. The opinion of the three-judge District Court is also unreported and it appears in the Appendix to the Petition at 8a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether or not there presently exists between the petitioners Larry Frierson, Jimmie Mack, Willie Lee Peterson, William Frierson and Burnell Franklin and the respondents a case or controversy under Article III of the Constitution and within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201?

2. Whether or not the District Court abused its discretion in denying the petitioners' motion to add Alfred Bradley as an additional party plaintiff?

STATUTES INVOLVED

The pertinent provisions of Sections 16-558, as amended, 43-64, 43-214 and 43-215 of the South Carolina Code of Laws are set forth in the Appendix to the Petition at 31a-32a.

STATEMENT OF THE CASE

The United States Court of Appeals for the Fourth Circuit summarily affirmed the holding of the three-judge United States District Court that the petitioners lacked standing to challenge on constitutional grounds Sections 16-558, as amended, 43-64, 43-214 and 43-215 of the South Carolina Code of Laws and the use in South Carolina of lay magistrates in criminal trials because the petitioners did not present an actual case or controversy. [Appendix to Petition at 2a and 16a.]

On April 28, 1974, more than three months prior to the institution of this suit, Larry Frierson, William Frierson and Jimmie Mack, together with Willie Lee Peterson, were stopped by two Bishopville policemen while the four of them were riding through the Town of Bishopville in an automobile driven by William Frierson. The latter was charged with running a red light and taken to the county jail by the police officers. Mack, Larry Frierson and Peterson followed

William Frierson and the officers to the jail. They were met by police officers at the door, one of whom was a deputy sheriff and the other a municipal policeman. The three were asked by the officers what they wanted at the jail and they responded that they had come to determine the status of William Frierson. [R. at 88-89 (Aff., Mack ¶ 4 at 1-2); R. at 150-151 (Aff., L. Frierson ¶¶ 5 and 6 at 1-2); R. at 148-149 (Aff., W. Frierson ¶¶ 4 and 5 at 1-2).] Mack says that they were told by the officers that, if the three of them did not leave, they would be arrested for "being disorderly" or for "loitering." [R. at 89 (Aff., Mack ¶ 4 at 2).] Larry Frierson, however, says that the police officers threatened to lock them up for "disturbing the peace" and that Deputy Sheriff Ray Mickens told them that they could also be arrested for "loitering," if they did not leave. [R. at 151 (Aff., L. Frierson ¶ 6 at 2).] William Frierson, who was in custody, says only that his three companions were told by police officers at the jail that they would be charged with "disturbing the peace." [R. at 149 (Aff., W. Frierson ¶ 5 at 2).]

After they were threatened, Mack and Larry Frierson, along with Peterson, went to the home of William Frierson's father. The three returned with the latter to the jail and secured William Frierson's release, without additional difficulty. [R. at 89 (Aff., Mack ¶ 4 at 2); R. at 149 (Aff., W. Frierson ¶ 5 at 2); R. at 151 (Aff., L. Frierson ¶ 6 at 2).]

Burnell Franklin, a resident of Kershaw County, South Carolina [R. at 90 (Aff., Franklin ¶ 1 at 1)], was arrested in the Town of Bishopville by a town policeman, G. J. Davis, on August 5, 1974, the day the original complaint in this case was filed. He was charged with driving under the influence. After Franklin was given a breathalyzer examination, he was charged by the arresting officer with "being disorderly." He was subsequently brought to trial in the

Recorder's Court of the Town of Bishopville and was acquitted. [R. at 90-91 (Aff., Franklin ¶¶ 4 and 5 at 1-2).]

The petitioners moved to have Alfred Bradley added as a party plaintiff, but the District Court denied their motion. [Appendix to Petition at 6a.]

ARGUMENT

I. Important similar issues are not pending before the court.

The petitioners contend that *certiorari* should be granted because "this petition presents a question that is identical with, or similar to, an issue pending before this court in another case in which review has been granted, *North v. Russell,* No. 74-1409, involving the constitutionality of trial before lay judges." [Petition at 14.] That assertion simply is not true. Whether or not the petitioners could be constitutionally tried for a criminal offense before a lay magistrate is a question which the courts below never reached. Those courts held only that the petitioners lacked standing to raise that issue because they did not demonstrate a continuing case or controversy. [Appendix to Petition at 2a and 29a.]

Insofar as lay judges are concerned, then, the petition presents only the issue as to whether or not the petitioners have standing to challenge the constitutionality of being tried for a criminal offense before a lay magistrate. *North* is not concerned with that issue because its controversy, unlike the one here, is real and is not imagined.

II. The courts below did not misapply decisions of this court in dismissing the complaint for lack of standing.

The petitioners maintain that the Court of Appeals and the three-judge District Court "misapplied decisions of this Court in applying a standard of actual harm in determining standing to raise the lay judge issue." [Petition at 15.] Neither Court did any such thing. Both Courts properly applied decisions of this Court to certain facts in this case to determine whether any of the petitioners had standing to raise, among other questions, the lay judge issue; and both Courts concluded that none did have. [Appendix to Petition at 2a, 24a and 29a.]

Cited by the petitioners are a number of cases in which various judicial practices and procedures were invalidated. [*Id.* at 15-16.] Yet, each of those cases [*Peters v. Kiff,* 407 U. S. 493, 33 L. Ed. (2d) 83 (1972); *Bruton v. United States,* 391 U. S. 123, 20 L. Ed. (2d) 476 (1968); *Sheppard v. Maxwell,* 384 U. S. 333, 16 L. Ed. (2d) 600 (1966); *Estes v. State of Texas,* 381 U. S. 532, 14 L. Ed. (2d) 543 (1965); *Turner v. State of Louisiana,* 379 U. S. 466, 13 L. Ed. (2d) 424 (1965); *Jackson v. Denno,* 378 U. S. 368, 12 L. Ed. (2d) 908 (1964); *Haynes v. Washington,* 373 U. S. 503, 10 L. Ed. (2d) 513 (1963); *Hamilton v. Alabama,* 368 U. S. 52, 7 L. Ed. (2d) 114 (1961); *In re Murchinson,* 349 U. S. 133, 99 L. Ed. (2d) 942 (1954); *Glasser v. United States,* 315 U. S. 60, 86 L. Ed. 680 (1942); *Tumey v. State of Ohio,* 273 U. S. 510, 71 L. Ed. 749 (1926)] involved an actual case or controversy. This case does not. As the District Court found, none of the petitioners was actually confronted with an immediate and real threat of prosecution before a lay magistrate for any criminal offense. [Appendix to Petition at 24a and 29a]; and, of course, an actual case or controversy must be present before federal judicial power can be used to invalidate any state judicial practice or procedure. *See, Rizzo v. Goode,* .... U. S. ...., 44 L. W. 4095 (1976); *Ellis v. Dyson,* 421 U. S. 426, 44 L. Ed. (2d) 274 (1975); *Schlesinger v. Reservists to Stop the War,* 418 U. S. 208, 41 L. Ed. (2d) 706 (1974); *Steffel v. Thompson,* 415 U. S. 452, 39 L. Ed. (2d) 505 (1974). Article III of the Constitution [*O'Shea v. Littleton,* 414 U. S. 488, 38 L. Ed. (2d) 674 (1974)] and the Declaratory Judgment Act, 28 U. S. C.

§ 2201 [*Lake Carriers Association v. MacMullen*, 406 U. S. 498, 32 L. Ed. (2d) 257 (1972)] require it.

The petitioners argue, however, that it is not necessary for them to prove "actual prejudice" in order for the federal courts to strike down the use of lay magistrates in South Carolina. [Petition at 15-16.] That contention might very well be correct; but before a federal court can decide whether or not a trial before a lay magistrate in this State does, in fact, involve "inherent prejudice," as the petitioners claim [*id.* at 16], and whether or not the presence of "inherent prejudice" would warrant the invalidation of such judicial practice, the petitioners must first establish the existence of a justiciable case or controversy. And this they have not done.

The petitioners also assert that the "court below held that petitioners lacked standing for the additional reason that no prosecutions before magistrates were pending against them at the time of the filing of the complaint" [Petition at 17]; and they surmise that "[h]ad charges been pending, the court surely would have concluded that *Younger v. Harris*, 401 U. S. 37 (1971), was a bar to federal intervention." "Thus," they argue, "the lower court 'turn[ed] federalism on its head.' *Steffel v. Thompson*, 415 U. S. 452, 472 (1974)." [*Id.*] The finding by the District Court that none of the petitioners had a prosecution pending before a lay magistrate at the time the complaint was filed is not challenged by the petitioners; nor do they question the further finding by the District Court that the petitioners had not "shown that there was at the time suit was brought . . . an imminent threat of prosecution before either of the two defendant magistrates, or before any other magistrate in South Carolina." [Appendix to Petition at 24a.] Because the petitioners had shown only that "they think . . . criminal trials conducted by lay magistrates are unconstitutional" [*id.* at 27a], the District Court, relying upon

Steffel v. Thompson, supra [*id.* at 25a-26a], dismissed the petitioners' complaint.

To support their claim of standing, the petitioners cite *Steffel v. Thompson, supra*, and *Doe v. Bolton*, 410 U. S. 179, 35 L. Ed. (2d) 201 (1973). Neither case, however, aids the petitioners.

In *Steffel*, the plaintiff faced an imminent threat of arrest for engaging in a specific activity which he desired to continue, *i.e.*, the distribution of handbills at a shopping center. The threat of imminent arrest was corroborated by the actual arrest of Steffel's companion. Here, no petitioner faces an imminent threat of arrest and prosecution before a lay magistrate for engaging in a particular activity which he wishes to continue and for which a companion has been arrested and brought to trial before a lay judge.[1] At any rate, should any petitioner now or in the future be brought to trial before either of the two defendant magistrates or some other lay judge for a designated criminal offense, he can, as the defendant in *North v. Russell, supra*, did, raise the issue of the magistrate's constitutional qualifications at his trial.

In *Doe v. Bolton, supra*, this Court held that the physician-appellants, who were licensed doctors consulted by pregnant women, presented a justiciable controversy and had standing to attack Georgia's abortion statutes even though the record did not disclose that any of them had been prosecuted or threatened with prosecution for violation of those statutes. *Id.*, 35 L. Ed. (2d) at 210. They were

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[1] The threat about which the petitioners Larry Frierson, Jimmy Mack and Willie Lee Peterson complain occurred more than three months prior to the filing of the complaint. [Appendix to Petition at 22a; *see also*, R. at 88-89 (Aff., Mack ¶ 4 at 1-2); R. at 150-151 (Aff., L. Frierson ¶¶ 5 and 6 at 1-2.] The charges against William Frierson and Burnell Franklin, which arose in the Town of Bishopville, South Carolina, were disposed of not in a magistrate's court but in a recorder's court. Frierson forfeited bond and Franklin was acquitted. [R. at 148-149 (Aff., W. Frierson ¶¶ 4, 5 and 6 at 1-2); R. at 90-91 (Aff., Franklin ¶¶ 4 and 5 at 1-2); *see also*, Appendix to Petition, note 7 at 24a.]

able to demonstrate the existence of an actual controversy because the disputed state criminal statutes **continuously** and **directly** infringed upon **their particular** fundamental rights; thus, a "real and immediate" threat of injury was always present. Such is not the case here. *See, Ellis v. Dyson, supra,* 44 L. Ed. (2d) at 290 (Powell, J., dissenting).

The courts below, therefore, in dismissing the petitioners' complaint for lack of standing, did not misapply any Supreme Court decision.

III. There is no conflict of decisions.

The petitioners maintain that the conclusion below that petitioners lacked standing "is in conflict with decisions of other circuit and district courts, *e.g., Wulp v. Corcoran,* 454 F. (2d) 826 (1st Cir. 1972), *Anderson v. Nemetz,* 474 F. (2d) 814 (9th Cir. 1973), and *Decker v. Fillis,* 306 F. Supp. 613 (D. Utah 1969)." [Petition at 18.]

Any validity which those cases may have had at one time regarding the issue of standing is now, it seems to us, moot. Since those three cases were decided, this Court has decided *Rizzo v. Goode,* .... U. S. ...., 44 L. W. 4095 (1976), *Ellis v. Dyson,* 421 U. S. 426, 44 L. Ed. (2d) 274 (1975), and *Steffel v. Thompson,* 415 U. S. 452, 39 L. Ed. 505 (1974). The principles expressed by this Court in *Rizzo, Ellis* and *Steffel,* not the principles of *Wulp, Anderson* or *Decker,*[2] now determine a complainant's standing in the First and Ninth Circuits and in the District of Utah; and as we noted before, the District Court, whose decision was summarily affirmed by the Circuit Court, relied principally upon *Steffel.* There is, then, no conflict of decisions.

[2] A decision which the petitioners say "supports the importance of the standing issue involved in this case," *Thoms v. Heffernan,* 473 F. (2d) 478 (2d Cir., 1973) *rev'd.,* 418 U. S. 908, 41 L. Ed. (2d) 1154 (1974), was expressly remanded to the Court of Appeals for the Second Circuit for further consideration in light of two recent cases, one of which was *Steffel v. Thompson, supra.*

The petitioners, without explanation, also refer to *Washington v. Lee,* 263 F. Supp. 327, 329-330 (N. D. Ala., 1967), *aff'd sub nom., Lee v. Washington,* 390 U. S. 333, 19 L. Ed. (2d) 1212 (1968). In that case, the District Court held that the plaintiffs had standing to challenge the statutes and practices requiring segregation by race of those confined in certain Alabama penal facilities. Quoting *Singleton v. Board of Commissioners,* 356 F. (2d) 771 (5th Cir., 1966), the Court said:

> The general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of, future use. 263 F. Supp. at 329.

Suffice it to say, this case does not involve governmental segregation; therefore, the general principle applicable in such cases has no applicability here.

IV. The district court did not err in denying petitioners' motion to add Alfred Bradley as a party plaintiff.

Though the petitioners contend that the District Court abused its discretion in denying their motion to add the petitioner Bradley as a party plaintiff, they do not argue the point. [Petition at 20-21.] Indeed, it is not included by them as a question presented to this Court for review. [*Id.* at 2-3.] The petitioners, therefore, have not carried the burden of showing an abuse of discretion on the part of the trial court in refusing to grant the petitioners' motion to add a party plaintiff. *Cf., Curacao Trading Co. v. Federal Insurance Co.,* 137 F. (2d) 911 (2d Cir., 1943), *cert. denied,* 321 U. S. 765, 88 L. Ed. 1061 (1943). In any case, the reasons assigned by the District Court for refusing to permit Bradley to be added as a party were valid ones. [*See,* Appendix to Petition at 6a.]

CONCLUSION

For the foregoing reasons, the respondent submits that the petitioners' petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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